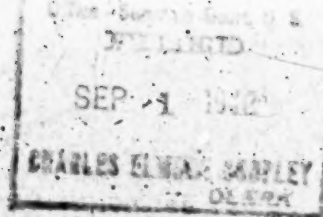


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No. 366

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**In the Supreme Court of the United States**

OCTOBER TERM, 1942

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THE UNITED STATES, PETITIONER

v.

BROOKS-CALLAWAY COMPANY

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF  
CLAIMS

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# INDEX

	Page
Opinions below .....	1
Jurisdiction .....	1
Question presented .....	1
Contract provisions involved .....	2
Statement .....	4
Specification of errors to be urged .....	7
Reasons for granting the writ .....	7
Conclusion .....	14

## CITATIONS

Cases:	
<i>Maryland Dredging Co. v. United States</i> , 241 U. S. 184 .....	10, 12
<i>Montello Salt Co. v. Utah</i> , 221 U. S. 452 .....	9
<i>The Betsey and Charlotte</i> , 4 Cranch 443 .....	9
<i>United States v. Bethlehem Steel Co.</i> , 205 U. S. 105 .....	12
Miscellaneous:	
American Law Institute, <i>Restatement, Contracts</i> :	
Sec. 457 .....	10
Sec. 467 .....	10
Page, <i>Contracts</i> (2d ed.) sec. 2703 .....	10
Standard Form of Government Construction Contract:	
Article 9 .....	2, 7, 13
Standard Form of Government Supply Contract: Article 5 .....	13
Williston, <i>Contracts</i> (Rev. ed., 1938):	
Sec. 1931 .....	10
Sec. 1959 .....	10
Sec. 1964 .....	10
Sec. 1968 .....	11

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1942**

**No. 366**

**THE UNITED STATES, PETITIONER**

**v.**

**BROOKS-CALLAWAY COMPANY**

## **PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on June 1, 1942.

### **OPINIONS BELOW**

The opinions of the Court of Claims (R. 18-22) are not yet reported.

### **JURISDICTION**

The judgment of the Court of Claims was entered June 1, 1942. Jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended.

### **QUESTION PRESENTED**

Whether the proviso to Article 9 of the Standard Form of Government Construction Contract which

provides that a contractor shall not be charged with liquidated damages for delays owing to unforeseeable causes beyond the control and without the fault of the contractor, including floods, contemplates the remission of liquidated damages for delay caused by high water which interferes with the progress of the work but which is customary and foreseeable.

#### CONTRACT PROVISIONS INVOLVED

Article 9 of the Standard Form of Government Construction Contract (R. 6; Fdg. 5, R. 13-14) provides:

**ARTICLE 9. Delays—Damages.**—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be

on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contrac-

tor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

#### STATEMENT

Respondent brought suit in the Court of Claims (R. 1-4) to recover the sum of \$3,800, which had been deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. It contended that liquidated damages had been improperly assessed because it had been delayed in the completion of the work by high water, among other causes.<sup>1</sup> The material facts as found by the Court of Claims (R. 12-17) are as follows:

Brooks-Callaway Company entered into a Standard-Form contract with the United States on October 12, 1931, whereby, for the consideration of 12c per cubic yard place measurement, it agreed to furnish all labor and material and perform all work required for the construction of the Missouri Bend Levee, Lots A, B, and C, containing approximately 2,300,000 cubic yards, and the St. Gabriel Levee, Lots A, B, and C, containing approximately

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<sup>1</sup> The other causes alleged were failure of the United States to procure a necessary right-of-way and the requirement of the contracting officer early in 1933 that the company build a tie-in levee between the new construction and an old levee, in anticipation of spring floods (R. 2). The court below decided against respondent on these two claims (R. 20).



1,750,000 cubic yards, both of which projects were located on the Mississippi River. The contract provided that the work should be completed within 450 calendar days after the receipt of notice to proceed (Fdg. 2, R. 12). Such notice was given on October 22, 1931, and accordingly January 14, 1933, became fixed as the contract date of completion (Fdg. 6, R. 14). Article 9 of the contract contained the usual provisions as to delays and damages, and the specifications provided that liquidated damages at the rate of \$20 a day should be assessed for every day in excess of the contract time that the contractor failed to complete the work (R. 6, 7; Fdg. 5, R. 13-14).

The Missouri Bend Levee was completed on March 22, 1933, and the St. Gabriel on August 25, 1933 (Fdg. 6, R. 14). Liquidated damages in the amount of \$5,800 for a total delay of 290 days were thereupon assessed against respondent and withheld from the contract price. Respondent protested against this deduction, and, upon consideration, the contracting officer found that respondent had been delayed by high water during the contract period for a total of 112 days on the Missouri Bend Levee, and for 4 days on the St. Gabriel Levee. He further found that it had been delayed by high water after the contract period for 162 days on the St. Gabriel Levee. He held that of the total delay owing to high water, 183 days were owing to conditions normally to be expected on account of high

water and that 96 days were unforeseeable.<sup>2</sup> He therefore recommended that liquidated damages in the sum of \$1,900 be remitted but that the balance of \$3,000 be retained. Settlement was made on that basis. (Fdg. 7, R. 14.)

The Court of Claims concluded that liquidated damages should not have been assessed against respondent for any of the delay owing to high water (278 days) (R. 18, 19), and gave judgment in favor of respondent (R. 22) for \$3,000, representing the 183 days of delay which the contracting officer found resulted from foreseeable high water.<sup>3</sup> Judge Madden dissented (R. 21-22).

<sup>2</sup> The contracting officer found (Fdg. 8, R. 21-22) that the remaining delay, being the difference between the total delay of 370 days and the delay of 278 days owing to high water, was not excusable on account of failure by the Government for a period to procure a necessary right-of-way or on account of the requirement made by the contracting officer in January 1938 that the contractor build a tie-in levee. On these points the court below sustained the contracting officer (see Fdgs. 9-13, R. 16-17; R. 19-20).

<sup>3</sup> The Government, in its exceptions to the Court of Claims Commissioner's proposed findings of fact, requested an additional finding by the court adopting and approving the contracting officer's determinations concerning the foreseeable delay from high water on the Missouri Bend and St. Gabriel construction. The court omitted to make any finding on this issue, presumably on the theory, expressed in its opinion (R. 19), that the question of foreseeability of high water was not material. See Defendant's Exceptions to Commissioner's Findings, dated November 25, 1941.



### **SPECIFICATION OF ERRORS TO BE URGED**

The Court of Claims erred:

1. In holding that under Article 9 of the Standard Form of Government Construction Contract liquidated damages cannot be assessed against a contractor for delay caused by high water where such was customary and foreseeable and where an ordinarily prudent person would have anticipated such high water and would have made allowance therefor in computing the time within which the contract was to be completed.
2. In entering judgment for the respondent.

### **REASONS FOR GRANTING THE WRIT**

The Court of Claims held that any high water which interfered with the progress of construction was a "flood" within the meaning of the proviso in Article 9 of the contract. And it held that the specific inclusion of "floods" among unforeseeable causes of delay exonerated the contractor from liquidated damages for delay owing to "flood" although this cause of delay could have been foreseen. We submit that the court below has decided an important question in the interpretation of the Standard Form of Government Construction Contract in a way which is untenable, being in conflict with the plain language of the contract itself, with the intent that should be ascribed to the parties to the contract, and with the ordinary rules governing interpretation of contracts.

1. The plain language of the proviso to Article 9 precludes the interpretation placed upon it by the court below. The Court of Claims determined that high water constituted a "flood" within the meaning of the contract, wherever the high water interfered with and delayed construction. It would seem that the term "flood" should not be taken to denote such high water; rather, it should be taken to signify abnormally great flow marked by the element of unexpectedness.<sup>\*</sup> That the term "flood" in the contract under consideration imports the idea of unforeseeability is manifested by the framing of the proviso in Article 9. That proviso states that the contractor shall not be "charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, *including*, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather . . . ." [Italics supplied.] It seems clear that these specific exempting causes do not enlarge the general category of "unforeseeable causes" as it would ordinarily be understood, but serve to illustrate the class of causes which excuse delay under the pro-

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<sup>\*</sup> The criterion of relative magnitude of flow alone would be unsatisfactory in determining whether a particular occurrence of high water amounted to a "flood".

viso. Cf. *Montello Salt Co. v. Utah*, 221 U. S. 452 466; *The Betsy and Charlotte*, 4 Cranch 443, 452.

The specific examples should not be thought operative without the qualification of unforeseeability, and so be held to impose the interpretation on the phrase "unforeseeable causes" that it shall include anyway these specific exempting causes of delay without regard to foreseeability. It is to be noted that the general category is qualified by the requirement that the excusing causes be "beyond the control and without the fault or negligence of the contractor" as well as "unforeseeable". It is apparent that the former qualification was intended to modify the specific causes. For example, fires owing to the contractor's negligence or strikes resulting from the contractor's willful refusal to comply with the National Labor Relations Act would not relieve from the payment of liquidated damages if delay resulted. On the same principle the qualification of unforeseeability must be read into the specific illustrations following the statement of the general category, so that only unforeseeable "floods" excuse delay. For this reason mere high water which interferes with and delays construction is not a "flood" within the meaning of the contract; the element of unforeseeability is requisite.<sup>5</sup>

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<sup>5</sup> For delay caused by high water which interfered with work and was unforeseeable the contracting officer made allowance in this case of \$1,900 liquidated damages, representing 95 days' delay (Fdg. 7, R. 14).

2. The construction given to the proviso by the court below fails to give effect to the intent of the parties. The purpose of the proviso in Article 9 is to restate the general rule as to impossibility of performance, thus obviating any dispute as to whether the doctrine of impossibility was intended to apply and does apply. Cf. *Maryland Dredging Co. v. United States*, 241 U. S. 184. Accordingly the proviso operates independently of general law, to protect the contractor against the assessment of liquidated damages for delays resulting from unforeseeable causes beyond his control and for which he could not reasonably be expected to make allowance in preparing his bid.\* In the absence of such a provision it is clear that the contractor would be held liable for a delay in performance resulting from causes which could reasonably have been anticipated even though they were not owing to his fault. See Williston, *Contracts* (Rev. ed., 1938) secs. 1931, 1959; American Law Institute, *Restatement, Contracts*, secs. 457, 467. There is nothing in the nature of the contract here under consideration which suggests an intention to change the rule of law in that respect. As Judge Madden pointed out

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\* Probably the effect of this proviso is to accord more liberal treatment to the contractor than he would receive at common law without it. For example, it is generally held that mere difficulty in construction owing to weather conditions does not excuse delayed completion. See Williston, *Contracts* (Rev. ed.) sec. 1964; American Law Institute, *Restatement, Contracts*, secs. 467, illus. 2; Page, *Contracts* (2d ed.) sec. 2703.

in his dissenting opinion (R. 22), the uncontradicted evidence in this case discloses that the contractor in making his bid took into consideration that there would be high water and that work on the levee would stop for its duration. It is also undisputed that Army engineers in preparing their estimate of the time which would be required for completion of the levee made allowances for the period during which work could not be continued owing to high water.<sup>7</sup> The proviso of Article 9 could hardly have been intended so to modify the general contract principles of impossibility as to extend the term of the contract on account of anticipated events for which provision was already made by both parties in fixing the period of performance and the contract price; circumstances existing or within the contemplation of the parties when a contract is made are strongly persuasive in its interpretation. See Williston, *op. cit. supra*, sec. 1968.

Moreover, the proviso operates to the mutual advantage of the parties. The contractor is in a position to estimate more closely both the time within which and the price at which he can perform the contract if he knows that unforeseeable events of a certain character will not compel him to pay liquidated damages for delay, and the Government in turn obtains the benefit of a lower

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<sup>7</sup> The court below made no finding in this respect, apparently on the theory that the question of foreseeability was immaterial. See fn. 3, p. 6, *supra*.

bid and the promise of a more prompt performance. The reason for the insertion of such a proviso fails when it is known to the contracting parties\* that a particular occurrence, such as high water, is reasonably probable during the progress of the work and is likely to interfere with it. An ordinarily prudent contractor makes and is expected to make allowances for events which he reasonably may expect to occur.

For the foregoing reasons we submit that the Court of Claims construed erroneously respondent's contract with the United States and that on proper construction that contract provides for remission of liquidated damages for delay only where the delay was occasioned by an unforeseeable event.<sup>a</sup>

3. The question presented by this case is one of importance. We are advised by the War Department and by the Navy Department that thousands of construction and supply contracts containing provisions for liquidated damages similar to that

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\* It is a matter of common knowledge that high water occurs in the Mississippi River at certain periods of the year, interfering with levee construction.

<sup>a</sup> The court below relied upon the rule of interpretation that any doubt should be resolved against the assessment of a penalty. This Court, however, has repeatedly held that a provision for liquidated damages in a government contract is not a penalty. Cf. *Maryland Dredging Co. v. United States*, 241 U. S. 184, 187, 189-190; *United States v. Bethlehem Steel Co.*, 205 U. S. 105.



here involved,<sup>10</sup> in which the damages are fixed at from \$5 to \$1,200 per day, have been made by those Departments for the Government in recent years and that a very great percentage of them are still in effect at the present time. Both departments have stated that it is impractical, owing to the magnitude of the task, for them to submit figures with respect to pending or potential claims for remission of liquidated damages under the delay provisions of Standard-Form contracts.

The liquidated-damages clause is one of the means adopted by the Government to procure prompt completion of contracts. Coupled with this clause is another, conferring on the Government the right to terminate a contract where the contractor fails to prosecute his work with reasonable diligence; the right to terminate for delay is subject to the same proviso as is the right to collect liquidated damages for delay. Accordingly, under the construction given to the proviso by the Court of Claims, the Government would be deprived of its most effective sanctions to procure completion of the work by the contractor within the contract time and of its effective means to provide otherwise for completion of the work, if any of the specific causes enumerated in the proviso had occurred during the course of the construction even though the occurrence was foreseeable.

<sup>10</sup> Article 5 of the ~~Standard~~ Form of Government Supply Contract contains provisions substantially similar to those of Article 9 in the Construction Contract.

If the decision below should stand, it would be too late now to reform contracts which have already been entered into or to introduce any saving clauses in the contracts which have been completed and in which claims for liquidated damages have been asserted during the past six years. Thus the effect of the Court of Claims decision, aside from its tendency to hinder the Government in procuring prompt completion of contracts, would be to furnish a basis for the assertion of many claims for the remission of liquidated damages involving large sums of money.

**CONCLUSION**

For the reasons stated above it is respectfully submitted that the petition for a writ of certiorari should be granted.

**CHARLES FAHY,**  
*Solicitor General.*

**SEPTEMBER 1942.**